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**Differentiated Integration and the Single Supervisory Mechanism: which way
forward for the European Banking Authority?**

Pierre Schammo^{*}

Abstract

The establishment of the Single Supervisory Mechanism (SSM), as the first pillar of an EU Banking Union, represents a significant step towards greater integration in banking supervision. However, the scope of the SSM is limited to a group of Member States. Member States such as the UK have insisted that they will not be part of the SSM. These non-participating Member States (NoPS) will nevertheless interact closely with SSM members, notably within the European Banking Authority (EBA). In order to organise their interactions, the EU legislature amended EBA's founding regulation. In particular, it introduced complex voting requirements. The aim of this paper is to reflect on these changes and to consider alternative arrangements for EBA.

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1. Introduction

The year 2014 will be remembered as a year of considerable change in the banking field. It saw the coming into force of the Single Supervisory Mechanism (SSM) – the EU’s ‘first step towards a banking union’.¹ The SSM will place the European Central Bank (ECB) at the heart of a new system of banking supervision.² It will bring about a higher level of integration in supervision. Crucially, however, it will not cover the whole of the EU. It will be limited to Eurozone countries and (non-euro) Member States that decide to join the SSM.

Because of its limited scope, the SSM is also an example of differentiated integration. A term of many meanings,³ it describes the basic idea of variation among states which pursue integration: some deciding to join in initiatives advancing integration of which others decide to abstain. In the context of the SSM, those latter Member States (non-participating Member States or NoPS) will not be part of the SSM. Yet, their interactions with the SSM will nonetheless be close: that is, within the European System of Financial Supervision (ESFS) which covers the whole of the EU and especially within the European Banking Authority (EBA) which is part of the ESFS and which, unlike the SSM, brings together competent authorities from all of the twenty-eight Member States. The point about these interactions is worth noting.

¹ Rec (12) Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63. See also rec (2) Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013 [2013] OJ L 287/29 (hereinafter, EBA Amending Regulation).

² For first contributions on the SSM, see E. Ferran and V. Babis, *The European Single Supervisory Mechanism*, 13 *Journal of Corporate Law Studies* 255 (2013); R. Lastra, *Banking Union and Single Market: Conflict or Companionship* 36 *Fordham International Law Journal* 1190 (2013); E. Wymeersch, *The Single Supervisory Mechanism or “SSM”, Part One of the Banking Union* (ECGI Law Working Paper No. 240/2014, February 2014); G. Ferrarini and L. Chiarella, *Common Banking Supervision in the Eurozone: Strengths and Weaknesses* (ECGI Law Working Paper No. 223/2013, August 2013); T. Tröger, *The Single Supervisory Mechanism – Panacea or Quack Banking Regulation?* (SAFE Working Paper Series No. 27, October 2013).

³ E.g. A. Stubb, *A Categorization of Differentiated Integration*, 34 *Journal of Common Market Studies* 283 (1996).

They prompted the EU legislature to review the regulation governing EBA (the EBA Regulation) and to amend its voting arrangements substantially.⁴ The aim of this paper is to reflect on these changes and in this process to map out alternatives for EBA. The changes which the EU legislature adopted are open to criticism. They are short sighted and fail to give sufficient consideration to the functioning of EBA. This chapter therefore evaluates alternative approaches. The aim is to find a better balance between the interests of Member States, whose competent authorities are the main decision-makers in EBA, and the proper functioning of EBA. Specifically, it is argued that the way forward is to rethink EBA's governance more fundamentally. This chapter will set out the basic requirements of such an approach.

Underpinning much of the discussion that follows are a number of observations about differentiated integration and the changes that were made to the EBA Regulation. At the outset, it is important to appreciate that whilst differentiated integration is a means to accommodate heterogeneous preferences for closer integration, it is also a likely source of tension between Member States. NoPS for example are likely to be concerned about externalities associated with differentiated integration. But they are also likely to be concerned about the potential political costs of deciding to abstain from participation in closer integration. Specifically, NoPS such as the UK are concerned about a possible loss of influence in EU decision-making fora. They fear the prospect of 'caucusing' among states participating in closer integration. It is this sort of reasoning which explains the thinking behind the recent changes to the EBA Regulation. For the UK, the fact that a majority of EBA members would originate from SSM Member States meant that its interests in EBA were at risk. The asymmetry between NoPS and SSM members within EBA's Board of Supervisors

⁴ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2013] OJ L331/12.

demanded therefore substantial changes, a view which was ultimately accepted by the EU legislature.

The paper proceeds as follows. Section 2 begins by presenting the SSM and the ESFS and especially the role of the ECB and EBA under the SSM and the ESFS respectively. Section 3 goes on to examine the way in which the EU legislature dealt with the concerns of NoPS. Given the importance of EBA as a place of interaction between NoPS and SSM members, it will mostly focus on the changes that were made to the EBA Regulation. Section 4 discusses alternative solutions for dealing with the SSM problematic within EBA. Section 5 concludes.

2. The Single Supervisory Mechanism and the European System of Financial Supervision: introducing the ECB and EBA

The aim of this section is to present the SSM and the ESFS, and more specifically the role of the ECB under the former **(a)** and the role of EBA under the latter **(b)**. Both actors are active in the banking field. But even though they have different roles under the SSM and the ESFS respectively, the establishment of the SSM will bring them into close contact **(c)**.

(a) The SSM and the ECB

The establishment of the SSM must be seen in light of the EU's efforts to stabilize the Eurozone following the 2007-08 financial crisis and the subsequent sovereign debt crisis. In June 2012, Eurozone leaders called for the establishment of the SSM in order to achieve a greater level of integration in banking supervision, but also as a condition for a possible direct recapitalisation of troubled banks by the European

Stability Mechanism.⁵ The SSM brings together competent authorities of participating Member States. The latter are Member States of the Eurozone. However, non-euro zone Member States are also allowed to join, provided that they enter into a close cooperation arrangement with the ECB.⁶ The ECB is at the heart of the SSM. It is not only responsible ‘for the effective and consistent functioning of the SSM’,⁷ but it is also a day-to-day supervisor which was vested with prudential supervisory tasks. The latter are specified in Council Regulation No 1024/2013.⁸ Overall, the SSM supervisory model can be described as based on an ‘uploading’ and ‘unloading’ of supervisory tasks: ‘uploading’ because the ECB will directly supervise credit institutions as a result of the establishment of the SSM;⁹ ‘unloading’ because the ECB in its role as prudential supervisor will need to rely on the expertise and work of national authorities (e.g. to carry out day-to-day verifications)¹⁰ and because the ECB will only directly supervise a fraction of credit institutions; others will continue to be supervised at national level. Thus, ‘less significant’ credit institutions will as a general rule be supervised by the authorities of participating Member States.¹¹ The significance of a credit institution is in turn determined according to criteria set out in Council Regulation No 1024/2013 and which are further specified in an ECB framework regulation.¹² Council Regulation No 1024/2013 nevertheless makes it plain that a bank should generally ‘not be considered less significant’ – and hence *be*

⁵ Euro Area Summit Statement (29 June 2012) http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf.

⁶ Art. 7., Council Regulation No 1024/2013.

⁷ Art. 6(1).

⁸ *Supra* n. 1.

⁹ For a description of the ECB’s tasks, see Arts 4 and 5.

¹⁰ Rec (37).

¹¹ Art. 6(4). See also rec (38).

¹² Council Regulation No 1024/2013 refers to size, importance for the economy, or significance of cross-border activities (see Art. 6(4) sub-para 1). Significance is established on an individual or consolidated basis. Note that a branch opened in a participating Member State by a credit institution established in a NoPS will also be subject to assessment as a supervised entity under the criteria set out in Art 6(4).

subject to direct supervision by the ECB – in one of the following scenarios: the total value of its assets is more than 30 billion euros; the ratio of its total assets over the GDP of the participating Member State represents more than 20% ‘unless the total value of its assets is below EUR 5 billion’; or where a national competent authority notifies the ECB that it considers an institution to be of significant domestic economic relevance and the ECB, after evaluation, confirms its significance.¹³ An institution must also be considered significant where public financial assistance has been requested or received ‘directly from the ESFS or the ESM’.¹⁴ The regulation also provides for the ECB to consider of its own initiative an institution to be significant in case where the latter operates across the border by way of subsidiaries in at least one participating Member States and where its cross-border assets or liabilities ‘represent a significant part of its total assets or liabilities’.¹⁵ Finally, the regulation requires the ECB to carry out its supervisory tasks in relation to the ‘three most significant credit institutions’ in each participating Member State ‘unless justified by particular circumstances’.¹⁶

In case where banks are not subject to the ECB’s direct supervision, they will continue being supervised by competent authorities of participating Member States. But even in this case, the ECB will solely be competent to (i) authorise or withdraw the authorisation of a credit institution and (ii) assess the notifications of the acquisition and disposal of holdings in credit institutions.¹⁷ In addition, even where direct supervision rests with national authorities, the latter are subject to the authority of the ECB, which has also an oversight role to play.¹⁸ Indeed, the regulation goes as

¹³ Art. 6(4) sub-para 2, point (i)-(iii).

¹⁴ Art. 6(4), sub-para 4.

¹⁵ Art. 6(4) sub-para 3.

¹⁶ Art. 6(4) sub-para 5.

¹⁷ Art. 6(4).

¹⁸ Art. 6(5)(c).

far as providing for a sort of *ad hoc* ‘uploading’ of oversight powers when allowing the ECB to take over the supervision of a credit institution which would otherwise be subject to national supervision.¹⁹

(b) The ESFS and EBA

The ESFS was created in 2010 as a response to the financial crisis and the recommendations of the *de Larosière* group, a group of experts set up by the Commission in 2008 in order to look into financial supervision.²⁰ Its main aim is to make sure that EU rules in the financial sector are properly implemented.²¹ To meet its objectives, the ESFS brings together different actors: at macro-prudential level, the European Systemic Risk Board (ESRB) was established, a body without legal personality, which deals with macro-prudential oversight of the financial system.²² At micro-prudential level new European supervisory authorities (ESA) were established: the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA) and of course the European Banking Authority (EBA).²³ The latter is the ESA that is active in the banking field. Its membership reflects the fact that unlike the SSM, the ESFS covers the whole of the EU. Thus, the main decision-makers within EBA are competent authorities from the twenty-eight Member States. They are the voting members of EBA’s Board of Supervisors, the main forum of decision-making.²⁴

Turning to EBA’s role under the ESFS, the first point to note is that EBA has an important role to play in rule making. It participates in the creation of a so-called

¹⁹ Art. 6(5)(b).

²⁰ The high-level group on financial supervision in the EU, Report (2009), <http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf>.

²¹ Art. 2(1), EBA Regulation.

²² Art. 2(2).

²³ *Ibid.*

²⁴ Art. 40(1).

single rulebook.²⁵ For this purpose, it is vested with the power to develop draft technical standards, which are formally adopted by the Commission.²⁶ EBA is also responsible for developing a so-called European supervisory handbook;²⁷ it is supposed to monitor and assess market developments²⁸ and it has an increasingly important role to play in relation to bank resolution and recovery.²⁹ Crucially however EBA is not a day-to-day supervisor. In contrast to the ECB, the EBA model is not currently based on an ‘uploading’ of day-to-day supervisory tasks. Instead of a fully-fledged transfer of competences, the EBA ‘supervisory’³⁰ model is based on possible *ad hoc* interventions. These interventions are supposed to take place vis-à-vis competent authorities and possibly market actors in the case of (i) disagreements between competent authorities; (ii) breaches of EU law; (iii) emergency situations; or (iv) if it is necessary to temporarily ban or limit financial activities.³¹ The thrust of these intervention powers is that they are binding and allow EBA to intervene in the relationship between competent authorities, or more exceptionally, in the relationship between competent authorities and market actors. However, the possibility of *ad hoc* interventions is nevertheless limited. The provisions are carefully worded and EBA’s intervention will be subject to various conditions and requirements which are specified in the EBA Regulation and in sectoral legislation.³²

²⁵ As called for by the European Council, 18/19 June 2009 (11225/2/09 Rev 2, 10 July 2009), para 20, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf.

²⁶ Arts 10-15, EBA Regulation.

²⁷ Art. 8(1)(aa). The ECB on the other hand will develop a so-called ‘supervisory manual’.

²⁸ Art. 8(1)(f).

²⁹ Art. 8(1)(i).

³⁰ I am using the term ‘supervision’ loosely.

³¹ Arts 19, 17, 18 and 9(5), EBA Regulation.

³² For example, under the provisions on settling disagreements, breaches of EU law and emergency situations, EBA’s power to intervene in the relationship between a market actor and a competent authority is not envisaged as a first line of response. Rather any such intervention is only possible if the relevant competent authority fails to comply with an EBA decision or, in the case of breaches of EU law, a formal Commission opinion (see Arts 17(6), 19(4), 18(4)). The EBA Regulation also enacts a safeguard clause under Art. 38. The latter applies in case where EBA takes a decision vis-à-vis a competent authority under its provisions on the settlement of disagreements or emergency situations. Art. 38 allows a Member State, which believes that its fiscal responsibilities are affected by this

(c) Interactions between EBA and the ECB following the Establishment of the SSM

The fact that the ECB and EBA are different actors with different roles does not mean that they do not interact. For one thing, both are active in the banking field and it is expected that EBA's activities in the area of a single rulebook, a supervisory handbook and stress testing will bring them in close contact.³³ There might also be a need to coordinate their activities at the international level.³⁴ Moreover, recall that SSM members are also members of the ESFS. Indeed, the EBA Regulation now also lists the ECB as among competent (or supervisory) authorities which are part of the ESFS.³⁵ It also includes the ECB within the definition of competent authorities.³⁶ Because of these amendments, the ECB will be subject to the authority of EBA. The latter will be able to carry out its tasks (for instance, its power to settle disagreements or to act in emergency situations) with respect to the ECB 'as in relation to the other competent authorities'.³⁷ The ECB will also be subject to the technical standards which EBA develops.³⁸ Likewise, it will be subject to EBA's guidelines and recommendations and to the provisions of the EBA Regulation on the EU supervisory handbook.³⁹

decision, to bring the matter in front of the Council. The latter may then decide the fate of EBA's decision. It is also worth noting that the ambiguous wording of some of these provisions may also limit their usefulness (see e.g. in relation to Art. 19, A Enria 'The Single Market after the Banking Union' (Speech, Brussels, 18 November 2013) <https://www.eba.europa.eu/documents/10180/490003/2013+11+18+-+AFME+-+EBF+-+Brussels+-+A+Enria>).

³³ V Constâncio, Implications of the SSM on the ESFS (Public Hearing on Financial Supervision in the EU, Brussels, 24 May 2013) <http://www.ecb.europa.eu/press/key/date/2013/html/sp130524.en.html>.

³⁴ See in this context Art 8, Council Regulation No 1024/2013.

³⁵ Art. 2(2)(f), EBA Regulation.

³⁶ Art. 4(2)(i).

³⁷ Rec (12), EBA Amending Regulation.

³⁸ Art. 4(3) ECB Regulation.

³⁹ Ibid.

3. The Establishment of the SSM: the Approach to NoPS

Section 2 introduced the ECB's and EBA's role under the SSM and the ESFS respectively. This section examines how the legislature sought to address the concerns which NoPS raised over the establishment of the SSM, especially in the context of EBA. Recall that while NoPS do not participate in the SSM, members of the SSM and NoPS participate in the ESFS and are members of EBA. This raised a number of issues for NoPS. I will begin by examining these issues **(a)**, after which I will examine the safeguards which the legislature put in place in favour of NoPS **(b)**.

(a) The SSM Conundrum: the NoPS' Concerns

As noted earlier, NoPS such as the UK were concerned about the impact which the SSM would have on EBA and on decision-making within EBA.⁴⁰ Specifically, they were concerned about the prospect of SSM members increasingly sharing common interests within EBA and NoPS losing influence as a result of 'caucusing' among SSM members.⁴¹ Underpinning these concerns was the view that NoPS and SSM members might in the future have conflicting preferences for courses of action within EBA, be that for instance on draft technical standards or on the use of EBA's intervention powers.

For NoPS, the issue was especially concerning because the establishment of the SSM results in a membership asymmetry within EBA. Even if the ECB has neither a vote in EBA nor is tasked with expressing a common position among SSM

⁴⁰ See e.g. House of Commons (Foreign Affairs Committee), *The Future of the European Union: UK Government Policy* (Volume I, 11 June 2013), <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmfaaff/87/87.pdf>, 45 noting that the SSM 'raised questions about the rights of non-Eurozone states in the European Banking Authority (EBA)'.

⁴¹ Evidence of these concerns can be found in various reports: see *ibid.* at 7, 42, 46, 47; HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union – The Single Market: Financial Services and the Free Movement of Capital* (2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332874/2902400_BoC_FreedomOfCapital_acc.pdf, 108.

members,⁴² EBA's Board of Supervisors – EBA's main decision-making organ – will, following the establishment of the SSM, comprise *voting* members from both within and outside the SSM. Furthermore, while the SSM will initially be made of the current eighteen Eurozone Member States, the membership of the SSM will increase over time: either because non-euro Member States decide to join the SSM voluntarily; or because they meet the euro entry requirements and are therefore required to join the euro.⁴³ In terms of EBA's membership this means that the constellation of SSM members and NoPS is asymmetrical in the Board of Supervisors and will become increasingly so in the future – hence the concern over caucusing among SSM members.

Admittedly, some might argue that the concerns of NoPS were misplaced. They might note – rightly so – that the precise impact which the SSM will have on the behavior of EBA's members is yet unknown.⁴⁴ They might also argue that at any rate agency members have incentives to cooperate sincerely with one another. This is because – as members of a network – they are concerned about maintaining their reputation vis-à-vis their peers.⁴⁵ However, one should caution against overgeneralizing such claims. Even though there is a large body of scholarship on EU agencies,⁴⁶ actual decision-making dynamics within EU agencies have attracted

⁴² As in the past, an ECB representative will sit on the Board of Supervisors of EBA (Art. 40(1)(d) EBA Regulation).

⁴³ The only Member States which benefit from an 'opt-out' are the UK and Denmark.

⁴⁴ Admittedly, concerns over caucusing among Eurozone countries are by no means shared by all. See, e.g., the evidence given by Sir Jon Cunliffe, Permanent Representative of the UK to the EU in front of the Foreign Affairs Committee in February 2013 (House of Commons (Foreign Affairs Committee), *The Future of the European Union: UK Government Policy* (Volume II, 11 June 2013), 43-4, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmfaaff/87/87ii.pdf>).

⁴⁵ This view is associated with G. Majone, *Dilemmas of European Integration – The Ambiguities & Pitfalls of Integration by Stealth* (OUP 2009) 101. See also B. Eberlein and E. Grande, *Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State* 12 *Journal of European Public Policy* 89, 101 (2005), noting that networks transform national representatives "from 'locals' into 'cosmopolitans'" (reference omitted).

⁴⁶ See e.g. the special issue of the *Journal of European Public Policy* in 2011 (issue 6). See also the early work of R. Dehousse, *Regulation by Networks in the European Community: the Role of European*

relatively little attention.⁴⁷ At any rate, any view or theory, which is too deterministic of the decision-making dynamics in agencies, is unlikely to capture the full picture. There is much variation among agencies. They operate in a variety of fields, including in fields where there has traditionally been a degree of competition between states. Even matters that are described as technical can have salience at Member State level. As far as EBA and its sister agencies are concerned, recall also that decision-making is firmly in the hands of national authorities: i.e., competent authorities.⁴⁸ Whilst the latter are meant to act in the public interest, they have nevertheless distinct organisational objectives and separate self-interest. Even if they are meant to act at arm's length from national governments, they are accountable for their actions at Member State level (e.g. in front of national Parliaments).⁴⁹ Hence, because of their national origins and their national accountability lines, it would be wrong to assume that competent authorities have necessarily the right incentives to genuinely cooperate when making decisions within the ESAs, especially when salient issues are involved. A number of recent reports lend support to these observations.⁵⁰

Agencies 4 Journal of European Public Policy 246 (1997); G. Majone, *The New European Agencies: Regulation by Information* 4 Journal of European Public Policy 262 (1997).

⁴⁷ M. Egeberg and J. Trondal, *EU-level Agencies: New Executive Centre Formation or Vehicles for National Control?* 18 Journal of European Public Policy 868, 870 (2011).

⁴⁸ Admittedly, the Commission is also likely to exert influence within agencies (see *ibid*). In relation to the ESA, see also F. Demarigny, J. McMahon and N. Robert, *Review of the New European System of Financial Supervision (ESFS) – Part 1*, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507446/IPOL-ECON_ET\(2013\)507446_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507446/IPOL-ECON_ET(2013)507446_EN.pdf), 34, noting that '[i]n practice, discussions and decisions have been heavily influenced by the major NCAs [national competent authorities] and the European Commission'.

⁴⁹ E.g. P. Schammo, *EU Prospectus Law – New Perspectives on Regulatory Competition in Securities Markets* (CUP 2011) 23-4; Demarigny, McMahon and Robert, *supra* n. 48 at 34.

⁵⁰ While it is generally accepted that the ESAs have performed well (e.g. European Commission, *Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)*, (COM(2014) 509 final) 2), the fact that national interests do matter and that the ESAs are not always places of genuine cooperation has been highlighted in a number of reports. The IMF for instance noted in 2013 that 'national interests may still influence decisions' in EBA (see IMF, *European Union: Publication of Financial Sector Assessment Program Documentation – Technical Note on European Banking Authority* (March 2013, IMF Country Report No. 13/74) 7 <http://www.imf.org/external/pubs/ft/scr/2013/cr1374.pdf>). More recently, the European Parliament noted in its resolution on the review of the European System of Financial Supervision that 'it has been difficult for national representatives to separate their role of head of a national competent authority and

To be sure, only time will tell whether NoPS' concerns were justified. In any event, hereinafter, I will adopt assumptions similar to those which underpinned the legislative changes: i.e., that there is room for conflict between NoPS and SSM members and that the prospect of caucusing among SSM members, and the resultant marginalisation of NoPS, was a valid one. I feel free to take this approach because the aim of this chapter is not to question NoPS' assumptions about the decision-making dynamics in EBA following the establishment of the SSM, but instead to assess what ought to be done if these assumptions prove to be accurate. I will begin by examining in more detail the way in which the legislature sought to protect the (minority) interests of NoPS.

(b) The EU Legislature's Approach to NoPS

I will first examine how the EU legislature sought to protect the minority interests of NoPS (i), after which I will examine the relevant provisions critically (ii). Given our interest in EBA, I will focus on the safeguards that are found in the EBA Regulation.⁵¹

(i) Safeguards

European decision-making challenging their ability to genuinely adhere to the requirement to act independently and objectively in the sole interest of the Union as a whole in accordance with Article 42 of the ESA regulations' (see European Parliament resolution of 11 March 2014 with recommendations to the Commission on the European System of Financial Supervision (ESFS) Review (A7-0133/2014). In a similar fashion, ESMA's Securities and Markets Stakeholder Group noted that the ESA's governance represented the 'main threat' to the ESAs' efficiency and that the composition of the boards of supervisors and management boards 'embed[ded] the interests of national authorities' (see ESMA Securities and Markets Stakeholder Group, *SMSG contribution to the ESFS consultation*, (18 July 2013, SMSG/2013/013) 7.

⁵¹ The EU legislature also added a number 'safeguard' provisions to Council Regulation No 1024/2013. Art. 1 of Council Regulation No 1024/2013 provides that: 'No action, proposal or policy of the ECB shall, directly or indirectly, discriminate against any Member State or group of Member States as a venue for the provision of banking or financial services in any currency'. The regulation also underlines the importance of maintaining the integrity or unity of the internal market (Art. 1; rec (10); rec (30)), in accordance with the conclusions of the European Council (e.g. European Council Conclusions 18/19 October 2012 (EUCO156/12, 19 October 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/133004.pdf, paras 6 and 8)). Indeed, the regulation goes as far as saying that the ECB has a 'duty of care for the unity and integrity of the internal market ...' (Art. 1).

The EU legislature sought to address the concerns of NoPS over the establishment of the SSM by amending or adding a number of provisions. What they have in common is that they are supposed to protect the interests of NoPS as members of the EU and as members of EBA. The recitals of the EBA Amending Regulation set the tone by highlighting the importance of maintaining the unity or integrity of the internal market, the cohesion of the Union and the need to prevent discrimination.⁵² NoPS' concerns are also reflected in the legally binding text of the regulation. Thus, following amendment, the EBA Regulation states that EBA must act 'independently, objectively and in a non-discriminatory manner, in the interests of the Union as a whole'.⁵³ In an attempt to ensure 'unbiased' decision-making, amendments were also made to the provisions on the use of internal panels within EBA.⁵⁴ Specifically, the mandatory use of panels was extended. Thus, EBA must now convene a panel when it seeks to use its powers to police breaches of EU law.⁵⁵ The purpose of the panel is to propose a decision to the Board of Supervisors. Before amendment, the EBA regulation already provided for the Board of Supervisors to rely on panels. But a panel only had to be convened when EBA used its powers to settle disagreements.⁵⁶

However, the most noteworthy change in the EBA Regulation concerns the voting rules which apply in EBA's Board of Supervisors. These changes aim to ensure that NoPS continue to have an effective voice in EBA. Recall that the voting members in EBA's Board of Supervisors are competent (national) authorities. Simple majority voting continues to be the basic voting rule in EBA, with each voting

⁵² Rec (1); rec (10); rec (22), EBA Amending Regulation.

⁵³ Art. 1(5) EBA Regulation.

⁵⁴ Art. 41.

⁵⁵ Art. 41(1a).

⁵⁶ For panels which intervene in the settlement of a disagreement, the regulation adds that the Board of Supervisors shall 'strive for consensus' when deciding on the composition of the panel (Art. 44(1)). If no consensus can be found, the Board of Supervisors will be required to take decisions 'by a majority of three quarters of its voting members' (ibid.).

member having one vote.⁵⁷ As in the past, this basic rule is modified in a number of cases. These cases were reviewed following the establishment of the SSM. Thus, decisions concerning the adoption of draft technical standards, as well as guidelines and recommendations continue to be adopted by a qualified majority, but this qualified majority must now include at least (i) a simple majority of board members representing competent authorities of Member States which participate in the SSM and (ii) a simple majority of board members representing competent authorities that are not among these Member States – NoPS in other words.⁵⁸ The same rule applies in case where EBA adopts measures under Chapter VI (dealing with budgetary matters) or under the third sub-paragraph of Article 9(5) which applies where EBA temporarily prohibits or restricts certain financial activities and a Member State asks EBA to reconsider its decision.⁵⁹

Decisions concerning (i) breaches of EU law; (ii) the settlement of disagreements between competent authorities; and (iii) actions in emergency situations will be adopted by the Board of Supervisors on the basis of a simple majority of the voting members. However, this majority must now include (i) a simple majority of board members representing competent authorities of Member States which participate in the SSM and (ii) a simple majority of board members representing competent authorities that are not among these Member States.⁶⁰ As far as EBA's power to settle disagreements or to address breaches of EU law is concerned, the EU legislature added another requirement which will come to affect the voting modalities once the constellation of SSM members and NoPS becomes highly asymmetrical: i.e., in case where the number of NoPS drops to four or less. In

⁵⁷ Art. 44(1).

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

this case the double-majority rule will cease to apply. Instead decisions will be taken by a simple majority ‘which shall include at least one vote from members from competent authorities of non-participating Member States’.⁶¹ At the same time, a new review clause was added to the EBA regulation.⁶² According to the latter, the Commission is required to review and report on the EBA voting arrangements, including those that apply to EBA panels, once the number of NoPS falls to four. To complicate matters further, the EU legislature added a ‘soft’ consensus principle, according to which the Board of Supervisors ‘shall strive for consensus’ when making decisions.⁶³ Finally, the composition of the Management Board now also reflects the new realities of closer integration among SSM members. EBA’s Management Board ensures inter alia that EBA carries out its mission and its tasks.⁶⁴ It is made of the Chairperson and six *voting* members – hence six national authorities – of the Board of Supervisors.⁶⁵ Following amendment, the EBA Regulation now states that among the members of the Management Board at least two should be representatives from NoPS.⁶⁶

(ii) The Legislature’s Approach: an ill-considered Approach

My aim here is to reflect on the above changes. I will argue that the EU legislature’s amendments to the EBA Regulation are open to criticism on at least two grounds: first, because they failed to take account of the lessons of the past; second, because the EU legislature failed to differentiate meaningfully between the interests of Member States and the proper functioning of EBA.

⁶¹ Art. 44(1) sub-para 4.

⁶² Art. 81 a.

⁶³ Art. 44(4a).

⁶⁴ Art. 47(1).

⁶⁵ Art. 45(1).

⁶⁶ Art. 45(1).

- *failure to take account of the lessons of the past*

In order to examine how the legislature failed to give proper consideration to past lessons, I will begin with the ESAs' predecessors – the so-called 'Level 3' supervisory committees: CESR, CEBS, and CEIOPS. The Level 3 committees were collective actors.⁶⁷ They had no independent, overriding choice over their preferences, but depended on the preferences of national authorities.⁶⁸ This could complicate effective decision-making, not least because decisions were initially taken by consensus.⁶⁹ Unsurprisingly the consensus principle was modified in 2009. To address the threat of deadlocks or decisions at the lowest common denominator, new arrangements provided for decisions to be taken by qualified majority, but only where no consensus could be reached.⁷⁰

Turning to the ESAs, the first point to note is that at least in one important respect the ESAs are like their predecessors: competent authorities, as voting members of the Board of Supervisors or as members of the Management Board, are the main decision-makers within the ESAs. However there are important differences in terms of decision-making. In particular, when establishing the ESAs, the EU legislature adopted different voting requirements: decisions were as a rule to be adopted by a simple majority. Qualified majority voting was only applicable in specific cases and by way of derogation from the simple majority rule. These changes reflected the lessons of the past. Whilst not abandoning the collective nature of decision-making by competent authorities (as voting members of the ESAs), they

⁶⁷ Schammo, *supra* n. 49, at 23 (in relation to CESR).

⁶⁸ On the meaning of collective actors, see F. Scharpf, *Games Real Actors Play – Actor-Centered Institutionalism in Policy Research* (Westview Press 1997) 54-55.

⁶⁹ See European Commission, *Public consultation paper on amendments to Commission Decisions establishing CESR, CEBS & CEIOPS*, (23 May 2008), http://ec.europa.eu/internal_market/finances/docs/committees/consultation_en.pdf, 9.

⁷⁰ E.g. Commission Decision of 23 January 2009 establishing the Committee of European Banking Supervisors [2009] L25/23, Art. 14.

reflected attempts to facilitate decision-making in the face of divisions between voting members. The changes proved useful. Especially the new voting requirements made a positive contribution to the functioning of the ESAs.⁷¹

As we have seen in the previous sub-section, closer integration led to a rethink of the voting arrangements in EBA. To fully appreciate the issues which these changes raise, it is worth contrasting the changes which the EU legislature adopted with those that the Commission proposed. In its proposal, the Commission sought to rely more on sub-delegation. It proposed to strengthen the role of independent panels.⁷² Panels would be required to propose decisions to the Board of Supervisors not only for the purposes of settling disagreements under Article 19, but also in relation to breaches of EU law under Article 17.⁷³ As before, the panels would be made of the (full-time) EBA Chairperson and two (voting) members of the Board of Supervisors.⁷⁴ Given that EBA's Chairperson is a member of the panel *ex officio*, members of the Board of Supervisors were left with only two members to appoint to the panel. Under the Commission proposals, at least one of them was supposed to be from a NoPS.⁷⁵ Significantly, the Commission proposed that panel decisions be adopted by EBA unless *rejected* by the Board of Supervisors by way of a simple majority. This majority had to include at least three votes from members of states participating in the SSM and three votes from NoPS.⁷⁶ It is plain that this 'reverse voting mechanism' would have weakened the influence of the Board of Supervisors over the decisions taken by the independent panel since panel decisions could only be blocked if voting members from within and outside the SSM had a shared interest in

⁷¹ Demarigny, McMahon and Robert, *supra* n. 48 at 34.

⁷² See European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 ...*, (COM(2012) 512 final, September 2012).

⁷³ Art. 41(2) (as proposed).

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Art. 44(1) (as proposed).

doing so.

The EU legislature's approach was notably different. Its response to the establishment of the SSM was to reaffirm the say of board members over EBA's decisions and to cement more forcefully the division between SSM members and NoPS in the voting structure of EBA's Board of Supervisor: we saw the voting arrangements earlier. Thus, the legislature rejected the idea of a reverse voting mechanism and extended the double-majority system. It also strengthened the influence of the Board of Supervisors over the panels. As amended, panels will be made of the Chairperson and six other EBA members who are, according to recital (15) of EBA's Amending Regulation, *voting* members of the Board of Supervisors – hence national authorities. Panel decisions are adopted 'where at least four members vote in favour'.⁷⁷ As Ferran and Babis note, the thinking was that by broadening the participation of Member States, the position of the panel would be strengthened.⁷⁸ However, by widening participation, these amendments also effectively lessened the influence of the only full-time independent EBA representative: that is EBA's Chairperson. The EU legislature also introduced a general 'soft' consensus principle for decisions taken by the Board of Supervisors. As noted above, the Board of Supervisors must now 'strive for consensus' when making decisions.⁷⁹ Although the requirement to strive for consensus is meant to be without prejudice 'to the effectiveness of the Authority's decision-making procedures',⁸⁰ for a supposedly technocratic body such as a EBA whose decisions ought to be argument- or evidence-based, the merit of the consensus principle is nevertheless questionable – not least

⁷⁷ Art. 41(1a) and (2), EBA Regulation.

⁷⁸ Ferran and Babis, *supra* n. 2, at 280.

⁷⁹ Art. 44(4a), EBA Regulation.

⁸⁰ *Ibid.*

because it will make it more complicated to impose decisions in the face of differences between competent authorities.

Hence, in short, the Commission's proposed response to closer integration among Eurozone members was to put greater emphasis on a 'sub-delegation' and to weaken the influence of EBA's Board of Supervisors in the process. However, the Commission failed to deal comprehensively with the issues raised by closer integration when proposing revisions to the voting arrangements. For the EU legislature, closer integration meant that the national influence over EBA had to be maintained if not strengthened. As a result, the EU legislature reaffirmed the influence of EBA's Board of Supervisors over EBA. In conclusion, it can be suggested that closer integration among SSM members has brought about a change of thinking: whilst in the past the EU legislature was concerned about putting in place modalities for ensuring that the ESAs could make decisions in the face of divisions between their members (e.g. simple majority voting, no consensus requirement), the more recent changes suggest that the EU legislature now considers that divisions in EBA are an inevitable outcome of closer integration among SSM members and that protecting the interests of Member States, especially the minority interests of NoPS, justifies the potential costs associated with new, more burdensome, decision-making arrangements (double majority system; soft consensus requirement).

- failure to differentiate meaningfully between the interests of Member States and the proper functioning of EBA

It is plain that from an EU point of view, the legislature's concern with Member State interests is not unproblematic. The new decision-making arrangements might well be at the expense of the effective functioning of an EU body (EBA). However for the EU

legislature, it was no cause for concern. From its perspective, the point was simply that EBA would no longer function properly if the voice of NoPS were at risk of being marginalised in EBA.⁸¹ Thus (i) the need to protect the interests of Member States – especially the interests of NoPS – and (ii) the need to ensure the proper functioning of EBA required one and the same solution: that is changing the voting modalities. This thinking is reflected in Rec (14) of the EBA Amending Regulation which states that the amendments to the decision-making arrangements in the Board of Supervisors were necessary in order to ‘ensure that the interests of all Member States are adequately taken into account and to allow for the proper functioning of EBA ...’. Yet, this approach, which does not meaningfully differentiate between these two objectives, is open to criticism. In contrast to an intergovernmental ‘club’ such as the Council, EBA is (normatively speaking) not a forum for defending and promoting Member State interests.⁸² Agencies are generally established for their technical and scientific know-how: ‘[t]he independence of their technical and/or scientific assessments is ... their real *raison d’être*’ according to the Commission.⁸³ Hence, while it is plain that the proper functioning of an institution such as the Council must be seen as closely linked to the issue of protecting the interests of Member States, the same is not true for an EU agency such as EBA. To be sure, protecting the interests of Member States – i.e., Member States’ interests in ensuring that the voice of their competent authorities cannot systematically be marginalised in EBA – is a legitimate aim given the pivotal role which competent authorities play as decision-makers in EBA. But the question of whether EBA functions properly cannot simply be reduced

⁸¹ See also the EP’s reading of the changes in its resolutions of 11 March 2014, *supra* n. 50 at para BF, noting that ‘... the changes in the original voting system of EBA ... were a concession to some Member States and made the decision making procedures in the Board of Supervisors more onerous and cumbersome’.

⁸² Admittedly, in actual fact, decision-making in EBA is more complicated. As noted earlier, national interest considerations are not necessarily absent when competent authorities make decisions in EBA.

⁸³ European Commission, *The Operating Framework for the European Regulatory Agencies*, (COM(2002) 718 final, 11 December 2002) 5.

to the issue of whether the interests of Member States are taken account of.

But how then assess if EBA functions properly? Instead of amalgamating the above objectives, a more promising way is to turn to EBA's founding regulation. EBA depends for its operation on the rules that are set out therein; it owes its existence to it. Among other things, the regulation defines requirements and rules which EBA must observe when exercising its statutory tasks and in doing so sets constraints on the choices that competent authorities, as voting members of EBA, can make when exercising their decision-making powers. Article 1(5) lays down the basic requirements which EBA must satisfy. Pursuant to this provision, EBA is meant to act independently, objectively and in a non-discriminatory manner when exercising its tasks. Importantly, it must also act 'in the interests of the Union as a whole'. Hence, the question of whether EBA functions properly should be assessed in light of the requirements of Article 1(5). They essentially establish a baseline for assessing acceptable EBA behaviour and in doing so allow determining whether EBA functions properly. Moreover, these requirements are by no means trivial. Principles such as independence, objectivity, or indeed the requirement to act in the EU interest are not unique to EBA. They reflect more deep-rooted expectations about the behaviour of agencies or other EU bodies.⁸⁴ Given their importance, they are unlikely to be called into question by the EU legislature.

However, once we accept that the proper functioning of EBA should be determined along the above lines, the legislature's approach to decision-making in EBA suffers from a serious weakness: it is difficult to resolve successfully the conundrum of giving proper consideration to the interests of M-Ss (especially, the

⁸⁴ Principles such as independence and objectivity are strongly linked to agency governance. Principles such as to act in the EU's interest are found elsewhere as well: e.g. in the founding regulation of EBA's sister agencies, but also in provisions dealing with other bodies (e.g. Art. 309 TFEU on the European Investment Bank).

minority interests of NoPS) whilst ensuring that EBA can function properly. This is because the new voting arrangements will complicate, if not obstruct, decision-making in EBA.⁸⁵ Moreover, the voting arrangements will become especially problematic once the constellation of NoPS and SSM members becomes highly asymmetrical in the Board of Supervisors.⁸⁶ This is because it will give any remaining NoPS a disproportionate say over EBA's activities and indeed ultimately the last remaining NoPS, a veto power.⁸⁷ Such a voting system is not in the interest of the Union as a whole and will therefore not contribute to the proper functioning of EBA.

4. Alternative Approaches

It is useful to begin by summarising our argument so far. The previous section examined the changes which the EU legislature made to EBA's founding regulation in order to protect Member State interests', especially the minority interests of NoPS. I criticised the legislature for failing to differentiate meaningfully between two objectives: taking account of Member State interests (especially, protecting the minority interests of NoPS against the majority interests of the SSM) *and* ensuring that EBA can function properly. In this context, I submitted that the safeguards which the legislature adopted (i.e., a double-majority system and a 'soft' consensus principle) did not offer a proper balance between these two objectives. I concluded by noting that that the new decision-making arrangements in EBA complicated (at best) decision-making and if the number of NoPS continued to fall, the voting arrangements would increasingly be unfit for purpose. None of this is in the interest of

⁸⁵ See also e.g., Enria, *supra* n. 32, noting in relation to the new voting modalities that '[i]n order to protect national interests, we risk not being able to decide at the European level when this is most needed'); Demarigny, McMahon and Robert, *supra* n. 48 at 33, noting with regard to the double-majority requirement that it 'does not contribute to a more independent and EU interest orientated vote by members'.

⁸⁶ Recall that the number of NoPS is expected to diminish over time, as Member States join the euro or decide to join the SSM voluntarily.

⁸⁷ Admittedly, this did not escape the attention of the legislature. See the review clause in Art. 81a EBA Regulation.

the Union as a whole and as such does not contribute to the proper functioning of EBA. This section evaluates alternative ways for dealing with the above objectives. The aim is to find a better balance between them.

I will consider two types of strategies: fitting EBA's functions to its governance (hence varying its functions) **(a)** or fitting its governance to its functions (hence varying its governance structure) **(b)**. I will argue that the main weakness of the first strategy is that it is inadequate for addressing relevant issues or that it simply concedes that the ESA model has failed. The main weakness of the second strategy is that it demands significant concessions from Member States which might prove a step too far for NoPS in particular.

(a) Varying EBA's Functions: Fitting Functions to Governance

Under this first approach, the current EBA governance model, which vests overwhelmingly decision-making powers in national authorities, is maintained. However, instead of relying on cumbersome voting arrangements such as the double-majority system, EBA's functions are reassessed following the establishment of the SSM. This re-assessment also extends to the requirements which EBA members ought to satisfy when carrying out these functions. I will start with these requirements, which I will call 'rules of conduct'.

(i) Setting 'Rules of Conduct'?

'Rules of conduct' might *a priori* be a first possible line of response to closer integration among SSM members.⁸⁸ Rules of conduct are defined as *ex ante* requirements which target the behaviour of competent authorities when taking

⁸⁸ 'Rules of conduct' are highlighted as a strategy for dealing with differentiated integration in CEPR *Flexible Integration – Towards a More Effective and Democratic Europe*, (1995) 71.

decisions in EBA. Their purpose would be to deal with potential spillovers affecting decision-making within EBA (e.g. caucusing among SSM members in EBA). By targeting the behaviour of EBA's members (competent authorities), these rules would arguably also improve EBA's functioning. However, it is questionable whether such a strategy would have much to offer. Spillovers that affect decision-making can be difficult to address. Take the example of 'caucusing' among SSM members. Such a practice would leave NoPS without an effective say over EBA's decisions. Yet, there is in itself nothing illegitimate about SSM members sharing common preferences for courses of actions within EBA. If caucusing occurs, it will reflect converging interests among SSM members which is ultimately the consequence of all Member States having agreed to establish the SSM.

There are other problems with rules of conduct. For one thing, they must be properly monitored and enforced. This may well prove problematic. Consider in this context Article 42 of the EBA Regulation which requires (inter alia) the voting members of EBA's Board of Supervisors to act 'in the sole interest of the Union as a whole'. Recall also that following amendment, the EBA Regulation states that the Board of Supervisors should 'strive for consensus when taking its decisions'.⁸⁹ Both provisions target the behaviour of competent authorities; both can be described as rules of conduct. However, as Wymeersch notes, it is hard to see how the requirement to act in the EU's interest could effectively be enforced.⁹⁰ The same appears to be true of the requirement to 'strive for consensus'. It is questionable whether the European

⁸⁹ Art. 44(4a).

⁹⁰ E. Wymeersch, *The European Financial Supervisory Authorities or ESAs*, in E. Wymeersch, K. Hopt and G. Ferrarini (eds), *Financial Regulation and Supervision: a Post-Crisis Analysis*, 232, 298.

Court of Justice would consider itself able to carry out an extensive review of this requirement.⁹¹

(ii) Allowing for Dissenting Views?

The EU legislature might also consider taking more drastic action. For example, it might allow competent authorities, which hold minority views, to adopt dissenting views within EBA: for instance, on draft technical standards.⁹² Recall that EBA adopts these draft standards in order to contribute to a single rulebook. Allowing for dissenting views could be an effective means to deal with caucusing among SSM members. It might also contribute to resolving bottlenecks and hence allow decision-making to progress in all other matters in the interest of the Union as a whole.

However, here too, there are complications. First of all, dissenting views on draft standards would have no binding force unless the Commission would endorse them together with the draft technical standards to which they relate. Furthermore, it is plain that a system based on dissenting views would threaten to exacerbate differences between NoPS and SSM members. Crucially, such a system would risk undermining the so-called single rulebook, which as an objective, is closely associated with the establishment of the ESFS.⁹³ A fragmented rulebook would in turn be difficult to reconcile with a basic principle underpinning the SSM: that is, preserving the unity and integrity of the internal market. The latter is a principle that the UK sought to uphold during the negotiations, but which was also endorsed by the

⁹¹ See in this context the Court's approach to enhanced cooperation and especially its 'hands-off' approach to the requirement imposed on the Council to adopt a decision authorizing enhanced cooperation 'as a last resort'. See Joined cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council of the European Union* [2013] ECR I-0000, para 53.

⁹² See also the evidence given by K Lannoo in front of the House of Lords, *European Banking Union: Key Issues and Challenges – Written Evidence*, <http://www.parliament.uk/documents/lords-committees/eu-sub-com-a/EuropeanBankingUnion/BankingReformWEFINAL12.12.12.pdf>, 147 referring to, but not elaborating on, the idea of 'dissenting opinions'.

⁹³ Rec (5) EBA Regulation.

European Council in its conclusions⁹⁴ and given a legislative basis in Article 1 of Council Regulation No 1024/2013.⁹⁵ Hence, a system based on dissenting views would not be in the interest of the Union as a whole and would therefore not contribute to the proper functioning of EBA.

(iii) Abolishing some of EBA's Functions?

An even more drastic change would be to abolish some of EBA's functions: for example, some or all of EBA's intervention powers. It would arguably be a pragmatic response to closer integration among SSM members, especially if the constellation of NoPS and SSM members becomes highly asymmetrical in EBA's Board of Supervisors. It would recognise that EBA is not a supranational actor and that it faces limitations when using its intervention powers in a post-SSM world where its members are either within or outside the SSM. Take for example the case where EBA would attempt to use its dispute settlement powers in a disagreement between two powerful institutions such as the Bank of England and the ECB: the former being the central bank of possibly the only Member State which might not be part of the SSM in the future; the latter being at the heart of the SSM and as such at the heart of the concerns of its members.⁹⁶ The point is that EBA will find it difficult to act independently, objectively and in the interest of the Union as a whole if its intervention powers are targeted at those that decide over them.⁹⁷

⁹⁴ European Council 28/29 June 2012, Conclusions, (EUCO 76/12, 29 June 2012), para 4 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131388.pdf; European Council conclusions 18/19 October 2012, *supra* n. 51, para 6.

⁹⁵ See also rec (30), Council Regulation (EU) No 1024/2013.

⁹⁶ See also Lannoo's evidence in front of the House of Lords (*supra* n. 92), 146 noting that 'EBA's mediation power will no longer have any importance once ECB is in place'.

⁹⁷ EBA will thus find it difficult to satisfy the expectations of those who see it as a future mediator between different blocs of Member States. See e.g. FT 'UK opposes Mario Draghi role at watchdog' (27 January 2014) referring to comments by J De Larosière.

However, simply abolishing some or all of EBA's intervention powers in response to this conundrum is not an attractive solution either. The ESA's intervention powers were among the main innovations introduced under the ESFS. Abandoning them would in many ways leave the ESFS toothless. Meanwhile, the issues which they were meant to address – e.g. a lack of cooperation between competent authorities or a lack of consistency in a crisis situation – and which the establishment of the SSM might come to exacerbate would remain unaddressed.

(b) Varying EBA's Governance: Fitting Governance to Functions

In the preceding part, I found fault with all of the contemplated strategies. This section considers a different approach to the post-SSM conundrum. Under this approach, EBA's functions are maintained but its governance model is reassessed. Specifically the proposal is to add a group of appointed members – I will refer to them as trustees – to the Board of Supervisors. Like EBA's chairperson and executive director, these members would be full-time independent professionals.

The idea of rethinking the membership of the ESAs' boards of supervisors has gained currency in recent years. For example, ESMA's Securities and Markets Stakeholder Group suggested in relation to the ESAs, that each Supervisory Board should include six independent members which should also be members of the respective ESA management boards.⁹⁸ Likewise, a report commissioned by the European Parliament concluded that the supervisory boards of the ESAs should include a number of full-time members.⁹⁹ Following this report, the European Parliament in its March 2014 resolution on the ESFS recommended that the ESA

⁹⁸ ESMA Securities and Markets Stakeholder Group, *supra* n. 50 at 8.

⁹⁹ Demarigny, McMahon and Robert, *supra* n. 48 at 117.

management boards should be staffed by professionals who should become voting members of the ESA supervisory boards.¹⁰⁰

Hereinafter, I will examine whether the basic idea of reorganising the Board of Supervisors and relying on appointed members has anything to offer in the context of closer integration among SSM members.¹⁰¹ I will begin by considering the rationale for relying on independent appointees (or ‘trustees’) **(i)**, after which I will specify their tasks **(ii)**.

(i) Independent Appointees as Trustees

The idea of relying on independent full-time appointed members or ‘trustees’ is examined here as a way to improve the balance between the two objectives identified earlier: i.e., to take account of the interests of Member States in a post-SSM world (especially, NoPS’ interests not to be marginalised by a majority of SSM members in EBA) *and* ensuring that EBA can function properly. The notion of ‘trustee’ is borrowed from Majone who looked at the concept when attempting to explain the thinking behind different forms of delegation.¹⁰² For the present purposes, the analogy with the concept of trust has some usefulness, for it allows highlighting the basic characteristics of appointed members. Translated into the present context, the point is that the new EBA board members would be appointed in order to act independently and in the best interest of their sole beneficiary: that is the Union *as a whole*.

Hence, as trustees, appointed members would act independently of national interests. That is not to say that trustees would necessarily be inimical to Member

¹⁰⁰ See Annex to the European Parliament resolution of 11 March 2014, *supra* n. 50.

¹⁰¹ I will not discuss the role of EBA’s Management Board. Suffices it to say that I have argued in the past that the role of the Management Board should be reconsidered in favour of a stronger Office of Executive Director as a counterweight to the Board of Supervisors. See Schammo, *supra* n. 49, at 347 (in relation to ESMA).

¹⁰² E.g. G. Majone, *Two Logics of Delegation – Agency and Fiduciary Relations in EU Governance*, 2 *European Union Politics* 103 (2001).

State interests. For one thing, there is no reason to think that the Union's interests and Member State interests are necessarily exclusive of each other. Also, by defining the role of trustees in the above manner (i.e. to act independently and solely in the interest of the Union *as a whole*), it is possible to give consideration to both objectives. Thus, by acting independently and in the interest of the Union as a whole, trustees would seek to ensure that EBA functions properly. Moreover, by acting in this manner, they would also, within the limits of their powers, aim to make sure that EBA does not act in the interests of a group of Member States only: SSM members or NoPS for that matter. That said, the need to improve the balance of interests might well require a line to be drawn. Thus, whilst protecting NoPS from being systematically marginalised is a legitimate objective, ultimately any measure aimed at achieving this objective must not conflict with the proper functioning of EBA.

To be sure, a strategy that relies on independent trustees might be open to criticism on a number of grounds. Some might argue that I place too much 'trust' in full-time, independent appointees. In this context, they might point out that the objective of acting in the 'interest of the Union as a whole' does not allow prescribing in advance a single specific course of action.¹⁰³ The critique is beside the point. I use the notion of trustees precisely because appointees must be capable of making independent choices. Moreover, the point about independent full-time appointees is not that they are meant to be perfectly benevolent actors but that in comparison to actors which are embedded in a national context, independent appointees (whose self-interest is moreover closely intertwined with the fate of EBA) are comparatively more likely to identify themselves with EBA's objectives and thus to give them due consideration when deciding over different courses of action.

¹⁰³ See generally F. Scharpf, *Games Real Actors Play – Actor-Centered Institutionalism in Policy Research* (Westview Press 1997) 65 discussing normative role orientations.

Others might object to the idea of reserving the role of trustees to full-time appointed members only. They might argue that currently EBA's Board of Supervisors is mainly made of heads of independent administrative authorities who are already subject to a statutory duty to act in the interest of the Union as a whole.¹⁰⁴ There is however a crucial difference between full-time appointed members and heads of agencies. The 'primary institutional affiliation'¹⁰⁵ of heads of agencies is to institutions at national level: i.e., competent authorities. They are accountable for their actions/inactions to national actors (e.g. national parliaments) who have national interests in mind. Not only is the self-interest of heads of agencies intertwined with the fate of the authorities which they head, but they are also likely to identify themselves strongly with the separate organizational objectives of these agencies. Indeed, one can expect heads of agencies to have a particularly strong sense of affiliation.¹⁰⁶ On the other hand, full-time, independent appointees would have no affiliation to institutions at Member State level. Their sole affiliation would be to EBA. The assumption is that by insulating them in this manner, they would be better placed to act independently of national interests and in accordance with the requirements of EBA's founding regulation and Article 1(5) in particular.¹⁰⁷

¹⁰⁴ Art. 42 EBA Regulation.

¹⁰⁵ I borrow the phrase from M. Egeberg, *Experiments in Supranational Institution-Building: the European Commission as a Laboratory*, 19 *Journal of European Public Policy* (2012) 939, 939.

¹⁰⁶ See also European Parliament resolution of 11 March 2014 *supra* n. 50, noting that 'it has been difficult for national representatives to separate their role of head of a national competent authority and European decision-making challenging their ability to genuinely adhere to the requirement to act independently and objectively in the sole interest of the Union as a whole in accordance with Article 42 of the ESA regulations'.

¹⁰⁷ Admittedly, even in the absence of a national institutional affiliation, appointees still have national (Member State) origins. These origins might still be seen as having an impact on the issue of independence. It is worth noting in this context that if appointees are supposed to be judged on the basis of their independence, integrity and competence, there is no reason why they should not be third country nationals. This is all the more so for a body such as EBA which is not a policy-making body. There is some literature which examines the impact of nationality in the context of the European Commission. Egeberg differentiates between Commission officials and Commissioners (Egeberg, *supra* n. 105). After reviewing various studies, he notes with respect to Commission officials that even though nationality is not unimportant in all respects, 'nationality clearly plays a minor role' (*ibid.* 947). With regard to Commissioners, he concludes that nationality probably matters more, but 'nationality is

(ii) Tasks of Trustees

So far, I considered the basic rationale for appointing independent ‘trustees’ to EBA’s Board of Supervisor. Ultimately, however, the merit of this approach depends on the powers which trustees are vested with. Hereinafter, I will consider the merit of a two-stage approach. The basic thinking behind this approach is that the issues which the current voting arrangements raise will become more severe as the membership asymmetry between SSM members and NoPS in EBA’s Board of Supervisors increases.

- first stage

As noted, initially, we assume that the membership asymmetry between NoPS and SSM members in EBA is not too great. The current voting arrangements would therefore remain in place. Competent authorities, especially those originating from NoPS, would continue benefiting from the double-majority voting system. However, in order to improve the balance between the two objectives mentioned earlier, trustees would be appointed to the Board of Supervisors. Initially, they would participate in a non-voting capacity and their tasks within the board would be limited to monitoring and offering opinions on all matters, including on draft standards.¹⁰⁸ This type of independent scrutiny appears necessary in order to address, inter alia, the prospect of draft technical standards being watered down in the Board of Supervisors. This is not

only one of several parts of their compound role, and not necessarily the part most frequently evoked’ (ibid.). At any rate, he notes that in comparison to politicians with a ‘secondary affiliation to a purely territorially arranged structure’ – he points to the European Council – the behaviour of Commissioners is still markedly different (ibid.).

¹⁰⁸ Opinions on draft technical standards would obviously be considered by the Commission.

an unlikely prospect. Recall that board members must now ‘strive for consensus’ when making decisions.

In addition to their role in the Board of Supervisors, trustees would be vested with one major task: to make sure that competent authorities ‘play by the rules’. The rationale for this proposal has to do with the consequences of differentiated integration. Specifically, the point is that differentiated integration can give rise to important externalities.¹⁰⁹ In the case of the SSM, these externalities can *a priori* be imposed by SSM members or by NoPS (e.g. trade deflections as a result of differences in the application of common rules). It is therefore in the common interest of all the Member States that the power to deal with such externalities belongs to actors who are different from those that can impose such externalities.¹¹⁰ Two of EBA’s intervention powers are closely related to this task: the power to participate in policing breaches of Union law under Article 17 and the power to settle disagreements under Article 19 of the EBA Regulation. Currently these powers are not administered independently: competent authorities, as voting members of EBA’s Board of Supervisors, decide over their use. This state of affairs is unsatisfactory and will be even more so under EBA’s new voting arrangements. As noted earlier, the latter will complicate, if not obstruct, decision-making. Hence in the presence of externalities it is in the interest of both Member States and EBA that the power to settle disagreements and police breaches of EU law be vested in trustees. Trustees will be better placed to ensure that EBA can act independently and by doing so ensure that all competent authorities play by the rules.¹¹¹

¹⁰⁹ See generally, *Flexible Integration*, *supra* n. 88.

¹¹⁰ *Ibid.* at 129-130.

¹¹¹ It is worth noting that the European Parliament in its March 2014 resolution appears similarly to recommend that some intervention powers be removed from the hands of competent authorities. Thus, the Parliament recommended that the Board of Supervisors focus ‘on giving strategic guidance to the ESAs work, adopting technical standards, general guidelines and recommendations and decisions on

- *second stage*

Further changes will be necessary if the constellation of NoPS and SSM members becomes highly asymmetrical in the Board of Supervisors.¹¹² This is because the current voting arrangements will increasingly be unfit for purpose in this case: as the number of NoPS continues to diminish, any remaining NoPSs (indeed possibly only the UK) will be left with a disproportionate say over EBA's activities. As noted earlier, such a state of affairs is not in the interest of the Union as a whole and will not therefore contribute to the proper functioning of EBA. However, simply abandoning EBA's double-majority system with no further changes is not in the Union's interests either, as it would give the SSM an in-built majority in EBA.

To address this conundrum, it is suggested that the role of trustees be reassessed at this stage. A possible way forward is for them to become more actively involved in decision-making in the Board of Supervisors. Specifically, trustees should be given the right to vote alongside competent authorities. The guiding principle underpinning such a change was repeatedly mentioned: to find a better balance between (i) ensuring that EBA can function properly and (ii) making sure that the interests of Member States are taken into account. Whilst the first objective pleads against maintaining the current voting modalities once the composition of the board is highly asymmetrical, the second rules out a wholesale transfer of decision-making powers to trustees. Thus, to improve the balance of interests, it is suggested that the

temporary interventions and other decisions are taken by the Management Board with, in certain cases a right for the Board of Supervisors to object to the Management Boards proposal' (European Parliament resolution of 11 March 2014 (*supra* n. 49)).

¹¹² The fact that reforms to the voting arrangements might be necessary is also reflected in Art. 81a EBA Regulation which provides that if the number of NoPS drops to four, the Commission needs to review the operation of EBA's voting arrangements.

way forward is to maintain a double-majority requirement¹¹³ between SSM members and NoPS, but to provide for trustees to act as a third group of voting members. The crux of this approach is that a decision would no longer necessarily require votes from both NoPS *and* SSM members. Under the proposed voting system, an EBA decision could be adopted with either the support of SSM members *or* NoPS, provided that a decision would also have the unanimous support of trustees. Such a system would arguably be superior for a number of reasons. For one thing, NoPS would continue benefiting from a double-majority requirement (or a similar arrangement which seeks to protect the say of NoPS by differentiating between them and SSM members for voting purposes)¹¹⁴ in their interactions with SSM members. In particular, the requirement would continue protecting any remaining NoPS from the SSM's in-built majority in EBA. At the same time, however, the new voting system would allow mitigating the effects of an increasingly asymmetrical Board of Supervisors. Specifically, the new modalities would contribute to preventing a very small number of NoPS from having a disproportionate say over EBA's actions. An EBA decision could henceforth be adopted with the support of a majority of SSM members, provided that such a decision would benefit from the unanimous support of trustees.¹¹⁵ Moreover, by allowing EBA to adopt a decision in this way, the proposed voting modalities would contribute to resolving any bottlenecks which may come to obstruct decision-making under the current voting system. Trustees would be held to decide unanimously in order to give their decisions greater legitimacy. Moreover,

¹¹³ Or a similar arrangement which seeks to protect the say of NoPS by differentiating between them and SSM members for voting purposes. Recall that the number of NoPS may well fall to one. Insisting on a majority of NoPS would not make much sense in this case.

¹¹⁴ See *supra* n. 113.

¹¹⁵ Equally, of course, a decision could be adopted if it had the support of NoPS and the unanimous support of trustees.

their duty to act in the sole interest of the Union as a whole would rule out any action or decision which would be bluntly in favour of either the SSM or NoPS.

It is important to stress that a more active involvement of trustees would not prevent NoPS and SSM members from reaching common decisions without the support of trustees. Moreover, trustees would have no power to make decisions unilaterally, except as far as dispute settlement and breaches of EU law are concerned. As argued earlier, it is in the interests of all the Member States that these powers be administered independently.

5. Conclusion

The aim of this paper was to consider ways in which EBA could move forward in the wake of the establishment of the SSM. I have focused on defining the basic principles of an approach which seeks to rely on independent, full-time, appointed members. Admittedly, this approach would require further elaboration. Questions such as the appointment procedure of trustees, their term of office, their accountability procedures are just a few questions which I have left open. Moreover, it is plain that implementing this approach would require concessions from Member States which some might be unwilling to make. Political feasibility therefore remains an issue. In this chapter, I have resisted taking the path of least (political) resistance. Instead, I have put forward ambitious proposals in an effort to open a necessary debate on the future governance of EBA following the establishment of the SSM. The point is that EBA's current voting arrangements are unlikely to offer a lasting solution. They will ultimately need to be reassessed if the number of NoPS falls over time.

That said, in order to improve the odds of the proposals, a range of strategies could *a priori* be envisaged. Aspects such as those left open could be subject to

negotiation as long as they do not undermine the basic principles outlined above. Safeguards could be put in place or simply re-affirmed. For instance, transferring day-to-day supervisory powers to the ESAs should be ruled out. As far as Article 19 (dispute settlement) is concerned, it is also important to stress that conciliation would continue to be a first line of response. Thus competent authorities would remain free to reach an agreement on their own during an initial conciliation phase. Moreover, as far as Article 17 is concerned, the Commission, as the guardian of the Treaties, would obviously continue playing a pivotal role under this provision. The role of trustees would as a result be limited.

Before drawing this chapter to a close, it is worth considering one final point with respect to the UK. In this chapter, I was interested in the choices which the EU and thus the UK might come to face with regard to EBA if the UK stays in the EU as a NoPS: that is, as a state which is not, and does not intend to be, part of the SSM or the Banking Union for that matter. Hence, I was not primarily interested in assessing the consequences of a *total* exit by the UK of the EU. In terms of the narrative of the book, the situation which I described and examined was therefore closer to a *partial* withdrawal than a total withdrawal by the UK. It is plain that if the UK were to leave the EU, it would no longer be a NoPS. It would no longer be a voting member of EBA either. That is not to say, however, that the UK would necessarily be shielded from the effects of closer integration among SSM members. Externalities, for example, can be imposed on third countries just as they can be imposed on NoPS. On the other hand, in the unlikely event of the UK joining the SSM, the UK would no longer be a NoPS either. Under the SSM, it would be treated as a non-euro participating Member State. It would continue to be part of EBA, but it would also be subject to the authority of the ECB in its new role as prudential supervisor. In both

cases (total exit or participation), the problematic which is discussed above would find a simple resolution, provided of course that all other (non-euro) Member States were ready to join the SSM. There would no longer be a need for complicated voting arrangements in EBA. Both scenarios (total exit or participation) remain however uncertain prospects at the time of writing.